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Supreme Court of the United States.

October Term, 1906.

CLARENCE A BRANDENBURG, *Plaintiff in Error*,
v.
DISTRICT OF COLUMBIA.
No. 191.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

The whole contention of the defendant in error in support of the constitutionality of the Act of Congress here in question is, it is respectfully submitted, based upon a series of fallacies.

In the first place, the exclusive jurisdiction of Congress over the District of Columbia is not, as the defendant in error would have it appear, exclusive of the prohibitions of the Constitution of the United States. National Bank *v.* County of Yankton, 101 U. S. 133, United States *v.* Lee, 106 U. S. 196, Wong Wing *v.* United States, 163 U. S. 238, Downes *v.* Bidwell, 182 U. S. at pp. 258 and 261. The word "exclusive" simply means, *exclusive of the States.*

In the second place, while the question of whether there shall be a special assessment upon property specially and peculiarly benefited by a public improvement to the extent of the special benefits, or whether the whole cost of the improvement shall be raised by a general tax, is a *question of legislative expediency, purely and simply*, and may be determined and declared by a general law applicable to all cases which may arise. The question in the cases as they arise, as to whether property is specially and peculiarly benefited by an improvement,

the extent of the benefit, and accordingly the amount of the special assessment, is not a question of legislative expediency to be determined according to either the wish or the caprice of the legislature, but it is a *question of fact, purely and simply,* and, being a question of fact, the determination of it, of course, depends upon the facts surrounding the improvement. Spencer *v.* Merchant, 125 U. S. 353 (quoted with approval in French *v.* Paving Co., 181 U. S. 338), in which this Court said:

> "The Question of Special Benefit, and the Property to Which it Extends is of Necessity a Question of Fact."

Accordingly, in order to justify the enactment of a law by a legislature providing that a certain area or district shall bear a special assessment representing the cost of a public improvement, made for the public interest, and *not for the purpose simply of such area or district,* or made partly for the public interest and partly for the interest of such area or district, the legislature must first give an honest consideration to the facts—the fact of the amount of the cost of the improvement, the fact of the amount of the special benefits, and the fact of whether the amount of the former fairly represents the amount of the latter; and questions of fact which necessarily differ in substantial respects in the different cases arising obviously can not be determined in a general or omnibus fashion in advance.

In the third place, none of the cases relied upon by the defendant in error can fairly be said to be in contravention with the proposition urged by us.

In Walston *v.* Nevin, 128 U. S. 578, and Shoemaker *v.* United States, 147 U. S. 282, the Acts in question expressly directed the tribunal to make necessary corrections to keep the assessment within the limits of the actual benefits.

"Unjust, unequal, or arbitrary burdens are not authorized to be imposed by the terms of the Act, and opportunity is given to every party interested to be heard in opposition to the enforcement of the liability in the courts, which are specifically authorized to 'make all corrections, rules and orders to do justice to all parties concerned.'" Walston *v.* Nevin, *supra*, p. 581.

"* * * it was provided that if the commission should find that the benefits were not equal to the cost and expenses of the land obtained for the park, they should assess each tract specially benefited to the extent of the benefit thereto." Shoemaker *v.* United States, *supra*, at p. 286.

In Mattingly *v.* District of Columbia, 97 U. S. 687, Mobile County *v.* Kimball, 102 U. S. 691, Louisiana *v.* Pillsbury, 105 U. S. 278, Spencer *v.* Merchant, 125 U. S. 357, and Wight *v.* Davidson, 181 U. S. 371, the legislatures passed upon individual cases of improvements, and since the facts were readily known and ascertainable, it was held simply that it should be presumed, nothing appearing to the contrary, that the assessment was made with regard to the facts.

In Bauman *v.* Ross, 167 U. S. 550, and Parsons *v.* District of Columbia, 170 U. S. 51, the whole situation passed upon in respect of the improvements provided for, was substantially known and uniform.

In the Irrigation and Reclamation Cases, Davidson *v.* New Orleans, 96 U. S. 97, Hagar *v.* Reclamation District No. 108, 111 U. S. 701, and Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112, the assessment area was determined by a tribunal after hearing all parties, and the assessment itself was effectual and enforceable only in a court of justice, where the parties were entitled to notice and allowed to contest the validity and the amount of the assessment. Moreover, it is to be observed, that in those cases this Court doubted whether the particular

legislation being passed upon would be valid, if it had been Federal, instead of State, legislation.

> "If private property be taken for public uses without just compensation, it must be remembered that, when the Fourteenth Amendment was adopted, the provision on that subject, in immediate juxtaposition in the Fifth Amendment, with the one we are construing was left out and this was taken." Davidson *v.* New Orleans, *supra*, p. 105.

> "The Fifth Amendment which provides, among other things, that such property shall not be taken for public use without just compensation, applies only to the Federal Government as has many times been decided. * * * In the Fourteenth Amendment the provision regarding the taking of private property is omitted, and the prohibition against the State is confined to its depriving any person of life, liberty, or property without due process of law." Fallbrook, etc. *v.* Bradley, *supra*, p. 158.

In view of the fact, however, that the process of law complained of in those cases was the settled process of law in the State at the time of the adoption of the Fourteenth Amendment, it was held that the general term "due process of law" in that Amendment should not be construed as prohibitory of it, the holding being in line with the settled determination by this Court in Minor *v.* Happersett, 21 Wall. 171, Bowman *v.* Lewis, 101 U. S. 22, 31, and Hurtado *v.* California, 110 U. S. 535.

In French *v.* Paving Co., 181 U. S. 324, the process of law complained of was also the settled process of law in the State at the time of the adoption of the Fourteenth Amendment, and, moreover, the situation in regard to which the assessment was made was one which was substantially well known and possessed the characteristic of substantial uniformity also.

In the fourth place, we submit that the decision of this Court in Norwood *v.* Baker, 172 U. S. 269, is con-

trolling in the case at bar. In that case the Court was not hampered because of any settled due process of law in the State at the time of the adoption of the Fourteenth Amendment, the due process of law in that State at the time of the adoption of the Amendment including an express provision that private property should not be taken for public use without compensation and that special assessments should not exceed special benefits. This Court, therefore, held that notwithstanding provision was made for giving some kind of a hearing to the parties before a court of justice before the assessment could be effectual, and notwithstanding the plaintiff had a hearing, and notwithstanding the ordinance providing for the special assessment related to a particular improvement, it appeared very clear that no consideration had been given to the determination of the *fact* of the amount of the special benefits, if any, and that the assessment was, therefore, void.

In the case at bar, this Court is, it is submitted, without difficulty as to the character of process of law required, because the Fifth Amendment has been in force as a restraint upon the Federal power from the beginning, and it has been utterly impossible for any acts repugnant to that Amendment to become the law of the land so as to render them due process of law (Marbury *v.* Madison, 1 Cranch, 176), and, moreover, the Fifth Amendment contains an express provision limiting the due process of law to such as shall not take private property for public use without just compensation. Furthermore, in the case at bar no hearing was provided for in a court of justice as a prerequisite to the assessment becoming effectual, and, therefore, none was or could be had. Then again, in the case at bar the law did not relate to a particular improvement, and, furthermore, questions of fact can not be determined in a general omnibus fashion by a general rule without considering

them. So far as the contention of the defendant in error that a hearing was provided for by the law before a jury is concerned, it is believed to be sufficient to quote from the opinion of this Court in C. B. & Q. R. R. Co. *v.* Chicago, 166 U. S. 226, as follows:

> "The mere form of the proceeding instituted against the owner, even if he be admitted to defend, can not convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation." (pp. 236–237.)

In the case at bar the sole province and power of the jury was to assess the damages and *apportion* the same with costs to the remaining property in the particular square in which the street was opened, with no rights of review of any kind before any judicial tribunal. In this respect the case at bar is more irregular than even Norwood *v.* Baker, *supra*, in which one of the main grounds of dissent, as stated by Mr. Justice Brewer, was that "the cost of this improvement was settled in judicial proceedings."

In conclusion, attention is called to the fact that the quotation from the case of United States *v.* Lee, set out in the closing portion of the brief of the defendant in error is unintentionally incomplete but is at the same time misleading. By reading the full paragraph (p. 217) from which the excerpt is taken a conclusion is reached foreign to the idea sought to be conveyed by the quotation.

Respectfully submitted,

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